Filed 7/27/10 P. v. Kraus CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. EDWARD FREDRICK KRAUS, Defendant and Appellant.	H0034684 (Santa Clara County Super. Ct. No. CC779766)

Defendant Edward Fredrick Kraus pleaded no contest to two counts of felony diversion of construction funds in excess of $1,000 (Pen. Code, § 484b)[1] in exchange for probation and dismissal of four remaining counts. The trial court suspended imposition of sentence, placed him on three years' felony probation with various conditions, and ordered him to pay certain fines, fees, and penalty assessments.

On appeal, defendant contends the trial court erred in (1) imposing an unconstitutionally vague and overbroad no-firearms probation condition, (2) ordering him to pay a court security fee and a criminal conviction assessment *as conditions of probation*, (3) failing to determine his ability to pay probation supervision costs, (4) adding a 10 percent administrative fee to a stayed probation revocation fine, and (5) calculating presentence conduct credits under former rather than recently-amended

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1 Further statutory references are to the Penal Code unless otherwise noted.

section 4019. The Attorney General appropriately concedes the first two points, and we conclude the third and fourth have merit. We reject defendant's final contention. We reverse the order of probation and remand for further proceedings.

I. Background

The details of defendant's crimes are irrelevant to the issues he raises on appeal, so we need not recount them. The parties stipulated that unidentified "reports . . . in the court's file" provided a factual basis for the entry of defendant's pleas.

Defendant filed a timely notice of appeal.

II. Discussion

A. No-Firearms Condition

The court imposed a probation condition that defendant "shall not own, possess, or have within his/her custody or control any firearm or ammunition for the rest of his/her life pursuant to Section 12021 and Section 12316(b)(1) of the Penal Code." Defendant claims this condition is unconstitutionally vague and/or overbroad because it lacks a scienter requirement. He contends, and the Attorney General concurs,[2] that the condition must be modified to prohibit defendant's *knowing* possession of any firearm or ammunition. We agree.

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the

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[2] The Attorney General also agrees that defendant may raise this issue for the first time on appeal, since it presents a pure question of constitutional law that is easily remediable by modification of the challenged condition. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K*).)

federal and California Constitutions.'" (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness. [Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Ibid.*)

The no-firearms condition the trial court imposed here does not satisfy the due process concept of fair warning. As defendant points out, the absence of a knowledge requirement subjects him to unfair risk that his probation could be revoked if, for example, he unknowingly transports ammunition or a handgun while helping a friend move, or travels in a car with someone who, unbeknownst to him, is lawfully carrying a weapon or ammunition in the trunk or in a purse or suitcase.

In *People v. Freitas* (2009) 179 Cal.App.4th 747 (*Freitas*), the court modified a no-firearms probation condition to specify that the defendant could not *knowingly* possess or have custody or control of firearms or ammunition. (*Freitas*, at p. 752.) The court reasoned that "[a] requirement of knowledge should be read into the probation condition for the same reason knowledge is required by CALCRIM No. 2510: the law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a firearm or ammunition." (*Freitas*, at p. 752.) We agree. The no-firearms condition must be modified to specify that defendant "shall not *knowingly* own, possess, or have within his/her custody or control any firearm or ammunition for the rest of his/her life pursuant to section 12021 and section 12316, subdivision (b)(1) of the Penal Code."

B. Probation Conditioned on Payment of Fee and Assessment

Defendant contends the trial court erred in imposing a court security fee (§ 1465.8) and a criminal conviction assessment (Gov. Code, § 70373) *as conditions of probation.*

He argues, and the Attorney General does not dispute, that the order of probation must be modified to clarify that those amounts were imposed by separate order, not as conditions of probation. We agree.

The Penal Code authorizes the imposition of certain restitution fines and orders as conditions of probation. (§§ 1202.4, subd. (m), 1203.1, subds. (a)(1) & (a)(2); *People v. Christensen* (1969) 2 Cal.App.3d 546, 549.) It also authorizes requiring defendants to reimburse various costs and fees, but *not as conditions of probation*. (§§ 987.8, 1203.1b; *People v. Flores* (2008) 169 Cal.App.4th 568, 579 (*Flores*).) One reason for the distinction is that probation "should be oriented towards rehabilitation of the defendant and not toward the financing of the machinery of criminal justice." (*People v. Baker* (1974) 39 Cal.App.3d 550, 559, superseded by statute on other grounds.) An equally compelling reason is that a defendant may be imprisoned for violating a probation condition, but not for violating an order to pay costs and fees. (*People v. Amor* (1974) 12 Cal.3d 20, 25.) Orders to pay costs and fees "can be enforced through a civil action—not through contempt proceedings, or the threat, express or implied, of revocation of probation. [Citations.]" (*Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 322; *People v. Washington* (2002) 100 Cal.App.4th 590, 592, citations omitted ["These costs are collectible as civil judgments; neither contempt nor revocation of probation may be utilized as a remedy for failure to pay. The costs are not conditions of probation"].)

Here, the court erred in imposing the court security fee and the criminal conviction assessment *as conditions of probation*. We conclude that the order of probation must be modified to eliminate any requirement that defendant pay these costs as conditions of probation, and a separate order directing their payment should be entered. (*Flores*, *supra*, 169 Cal.App.4th at p. 579.)

C. Probation Supervision Costs

Defendant claims the trial court erred in ordering him to pay probation supervision costs of up to $64 per month without first conducting a hearing on his ability to pay them, or obtaining his knowing and intelligent waiver pursuant to section 1203.1b. Emphasizing the court's conclusion that he lacked a present (and near future) ability to pay attorney's fees, defendant argues that he "had no more ability to pay this monthly [probation supervision] fee (maximum or otherwise) . . . than he did to pay attorney's fees." Reversal is required, he contends, since the court made no express finding of his ability to pay, and there is no substantial evidence in the record to support an implied finding.

The Attorney General responds that although defendant's failure to object below "arguably" forfeited his right to pursue the issue on appeal, "[u]nder the unique circumstances of this case, the most prudent course of action here would be to remand the matter to the trial court for a determination of [defendant's] ability to pay probation supervision costs and a determination of an amount to be paid." We agree.[3]

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[3] It has been held that "[f]ailure to object in the trial court to statutory error in the imposition of a probation fee under section 1203.1b waives the matter for purposes of appeal." (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072, citing *People v. Welch* (1993) 5 Cal.4th 228, 234-235 [probation conditions cannot be challenged for the first time on appeal].) However, as our high court has noted, reviewing courts retain discretion not to apply this procedural bar. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 ["Surely, the fact that a party may forfeit a right to present a claim of error to the appellate court if he did not do enough to 'prevent[]' or 'correct[]' the claimed error in the trial court [citation] does not compel the conclusion that, by operation of his default, the appellate court is deprived of authority in the premises. An appellate court is generally not prohibited from reaching a question that has not been preserved for appeal by a party"].) Here, where the Attorney General urges remand as "the most prudent course of action," we will not impose a forfeiture. Accordingly, we need not reach defendant's argument that, to the extent he forfeited his claim by failing to object below, his trial counsel rendered ineffective assistance.

A defendant may be ordered to pay "all or a portion of the reasonable cost of any probation supervision," depending on his or her ability to pay. (§ 1203.1b, subd. (a).) "When the defendant fails to waive the right provided in subdivision (a) to a determination by the court of his or her ability to pay and the payment amount, the probation officer shall refer the matter to the court for the scheduling of a hearing to determine the amount of payment and the manner in which the payments shall be made. The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative." (§ 1203.1b, subd. (b).)

"The term 'ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs . . . , and shall include . . . the defendant's: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position . . . . [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs." (§ 1203.1b, subd. (e).) A finding of ability to pay need not be express, but may be implied from the content and conduct of other trial court hearings. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71-72.) The inquiry may be conducted as part of the sentencing process; a separate, formal hearing is not required. (*Id.* at p. 70.) Where there is no indication in the record that the probation officer or the trial court determined the defendant's ability to pay probation supervision costs, or informed him of his right to a court hearing on the ability to pay, or obtained his knowing and intelligent waiver, it has been held that remand is appropriate. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1067-1068 (*O'Connell*).)

Here, it is undisputed that defendant did not expressly waive his right to a judicial determination of his ability to pay probation supervision costs. The probation report recommended imposition of costs "not to exceed $64 per month," but there is no

indication in the record that the probation officer made an ability-to-pay determination. While the court referred defendant to the Department of Revenue, it did so at the sentencing hearing at which it imposed the fee. Nothing in the record suggests the Department ever determined defendant's ability to pay or even saw the statement of assets form he filled out at the sentencing hearing. The trial court made no express ability-to-pay finding, and we see no evidence in the record to support an implied finding. We conclude that a remand is appropriate, so the trial court can determine defendant's ability to pay these costs. (*O'Connell*, *supra*, 107 Cal.App.4th at pp. 1067-1068.)

Defendant argues that the statement of assets form he filled out at the hearing compels the conclusion that a remand "would be no more than an 'idle gesture' that would consume more time than it is worth." (Citations omitted.) The Attorney General counters that although he has not seen the statement of assets form (which was sealed[4]), the record does not conclusively establish that defendant is unable to pay *any* probation supervision costs. We agree with the Attorney General's position.

Defendant's statement of assets form appears to have been hastily completed. Under "sources of income," defendant wrote, "Wife." In the space for her business or employer, he wrote, "N/A." He wrote "N/A" in the space for his sources of income and occupation. In the space for automobiles, he wrote "None (in my name)." Under "loans," he wrote "too many to list," and under "other debts," he wrote "much—to[o] long to list—will file BK possibly." Although the statement of assets form suggests defendant is virtually penniless, other information in the record suggests he may have the ability to pay *some* probation supervision costs.

Defendant is 52 years old. It appears that he is a building contractor licensed in California, and that he owned a business that was "Diamond Certified" and listed on the

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[4] In his reply brief, defendant states that he "has no objection to [the Attorney General] reviewing the statement of 'assets'—really a statement of debts."

Better Business Bureau's "honor roll." A gambling problem apparently caused him to lose that business. Before his extradition from Iowa, however, defendant was "working temporally" [*sic*] with his former employer. These facts suggest he is likely to obtain employment and that his "[r]easonably discernible future financial position" will permit him to pay something toward the costs of probation supervision. (§ 1203.1b, subds. (e)(2) & (e)(3).)

But there may be "other . . . factors that may bear upon the defendant's financial capability to reimburse the county for the costs." (§ 1203.1b, subd. (e)(4).) His appellate counsel describes him as "elderly" and "ill." There are unsupported assertions in the briefs and in the record that defendant has "medical issues (cancer, chemotherapy, heart attacks, and diabetes)." These assertions, if proven, would decrease the likelihood of defendant's obtaining employment within the one-year period from the date of the hearing, and that, in turn, could suggest he may not have the ability to pay probation supervision costs. (§ 1203.1b, subds. (e)(2)-(e)(4).)

The trial court is in the best position to assess and resolve these factual issues. We will direct the court, on remand, to determine defendant's ability to pay probation supervision costs and the amount, if any, to be paid. (§ 1203.1b; *O'Connell*, *supra*, 107 Cal.App.4th at pp. 1067-1068.)

D. Administrative Fee

The parties disagree on how to interpret the trial court's statement, at sentencing, that "[a] restitution fine of $220 is imposed under the formula permitted by section 1202.4(b) of the Penal Code. [¶] An additional probation revocation restitution fine equal to that [is] imposed and suspended pursuant to section 1202.4 of the Penal Code."

Defendant argues that the court "imposed a $200 restitution fine (Pen. Code, § 1202[.4]), plus a 10 percent administrative fee, for a total of $220." He claims the suspended $220 probation revocation restitution fine that the court also imposed similarly

reflects a 10 percent administrative fee. But an administrative fee on a probation revocation restitution fine is unauthorized, he argues, and therefore, "the unauthorized stayed probation revocation fine must be reduced from $220 to $200 . . . ."

The Attorney General counters that defendant's argument "fails because the record does not support his claim that the trial court imposed *any* fees pursuant to section 1202.4, subdivision (l)." (Italics added.)

The parties agree on the relevant law. Section 1202.4, subdivision (b) requires the court, "[i]n every case where a person is convicted of a crime," to "impose a separate and additional restitution fine . . . ." (§ 1202.4, subd. (b).) The amount of the fine is discretionary, but on a felony conviction, it "shall not be less than two hundred dollars . . . and not more than ten thousand dollars . . . ." (§ 1202.4, subd. (b)(1).) "In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(2).)

Section 1202.44 requires the court, "[i]n every case in which . . . a sentence that includes a period of probation is imposed" to "assess an additional probation revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4." (§ 1202.44.) The probation revocation restitution fine must be imposed "at the time of imposing the restitution fine . . . ." (§ 1202.44.)

Section 1202.4, subdivision (l) provides that "[a]t its discretion, the board of supervisors of any county may impose a fee to cover the actual administrative cost of collecting the restitution fine, not to exceed 10 percent of the amount ordered to be paid, to be added to the restitution fine and included in the order of the court . . . ." (§ 1202.4, subd. (l).) It is undisputed that the Santa Clara County Board of Supervisors has

authorized such a fee.[5] Where a county has authorized the administrative fee, section 1202.4, "[s]ubdivision (l) clearly and unambiguously provides for a 10 percent administrative fee to be imposed on any 'restitution fine' ordered pursuant to section 1202.4, subdivision (b)." (*People v. Robertson* (2009) 174 Cal.App.4th 206, 210 (*Robertson*).) "Throughout the statute, the 'restitution fine' is the fine imposed pursuant to subdivision (b)." (*Robertson*, at p. 211; see *People v. Eddards* (2008) 162 Cal.App.4th 712, 715 [section 1202.4 authorizes administrative fee "only with respect to collection of a *restitution fine*," not on amount ordered pursuant to § 1203.1, subd. (b)].) The Attorney General concedes that the 10 percent administrative fee can properly be imposed *only* on the restitution fine. As he notes in his respondent's brief, "it appears that to date the Santa Clara County Board of Supervisors has only authorized the fee for a fine under section 1202.4 . . ." and "the Santa Clara County Board of Supervisors resolution authorizing the administrative fee apparently only applies to section 1202.4."

Here, the trial court properly imposed the restitution fine that section 1202.4, subdivision (b) requires and the probation revocation restitution fine that section 1202.44 requires. The problem is that the trial court made no mention of the 10 percent administrative fee that both parties seem to agree should also have been imposed

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[5] The Attorney General explains that on June 8, 2004, the Santa Clara County Board of Supervisors passed a resolution stating: "'WHEREAS, when a defendant is convicted of any crime in the State of California, Penal Code section 1202.4(b) requires the court to order the defendant to pay a restitution fine for benefit of the Restitution Fund in the State Treasury; and [¶] WHEREAS, Penal Code section 1202.4(l) allows the board of supervisors of any county to impose a fee to cover the actual administrative cost of collecting the fine, not to exceed 10% of the fine; . . . [¶] . . . NOW, THEREFORE, BE IT RESOLVED that a fee to recover the actual administrative cost of collecting a restitution fine, up to a maximum of 10% of the fine, is hereby imposed.'" Neither party asks that we judicially notice this resolution or the fact of its passage. In the absence of any dispute, we will do so on our own motion. (Evid. Code, §§ 452, subds. (b) & (h), 455, 459; see *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 9 & fn. 5 [judicially noticing minutes "[i]n the absence of a sound objection"]; *Mapstead v. Anchundo* (1998) 63 Cal.App.4th 246, 253, fn. 3) [where facts of case were "essentially undisputed," judicially noticing board of supervisors' resolution].)

pursuant to section 1202.44. That omission makes the amount of the restitution fine the court meant to impose ambiguous.

We agree with defendant that "it seems clear" the court meant to impose a $200 rather than a $220 restitution fine, properly added a 10 percent administrative fee to the restitution fine, and then improperly added a 10 percent fee to the probation revocation restitution fine. In our view, the court's reference to "the formula permitted by section 1202.4(b)" signaled its intent to follow that formula. Application of the formula results in a $200 restitution fine ($200 x .5 [six-month jail term ordered] x 2 [conviction on two felony counts] = $200), with $20 left over. Twenty dollars is, conveniently, 10 percent of a $200 restitution fine, and that is precisely the percentage that section 1202.4, subdivision (l) requires Santa Clara County courts to impose as an administrative fee. (§ 1202.4, subd. (l).)

Since we are remanding this case, we need not definitively resolve the restitution fine issue. Instead, we will direct the court, on remand, to clarify the amount of the restitution fine it intended to impose pursuant to section 1202.4, subdivision (b) and to amend its order accordingly. If the court intended to impose a $200 fine, it shall amend the order to specify a $200 restitution fine, a $20 administrative fee, and a $200 probation revocation restitution fine. If, on the other hand, the court intended to impose a $220 restitution fund fine notwithstanding its reference to the "formula permitted by section 1202.4(b)," the court shall amend the order to impose the mandatory $22 assessment on the restitution fine.

E. Section 4019

Defendant contends the Legislature's recent amendment to section 4019, which went into effect on January 25, 2010, should have been applied retroactively to give him

an additional eight days' conduct credit against his jail term.[6] (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50.) We disagree.

California courts are divided on whether the amendment to section 4019 applies retroactively. The First District Court of Appeal has held that it does. (*People v. Norton* (2010) 184 Cal.App.4th 408.) However, this court has held that the amendment is not retroactive. (*People v. Hopkins* (2010) 184 Cal.App.4th 615.) We agree with the reasoning in *Hopkins* and reject defendant's contention that he is entitled to additional conduct credit.

III. Disposition

The order of probation is reversed, and the matter is remanded to the trial court with directions to conduct a section 1203b hearing to determine defendant's ability to pay probation supervision costs. If the court determines that defendant lacks the ability to pay probation supervision costs, it shall strike the provision requiring defendant to pay them. If the court determines that defendant has the ability to pay, the court shall specify a monthly amount, which shall not exceed $64 per month.

The court is further directed to modify the no-firearms condition of probation to specify that defendant "shall not *knowingly* own, possess, or have within his/her custody or control any firearm or ammunition for the rest of his/her life pursuant to section 12021 and section 12316, subdivision (b)(1) of the Penal Code."

The court is further directed to eliminate any requirement that defendant pay the court security fee and the criminal conviction assessment *as conditions of probation*, and to enter a separate order directing him to pay those costs.

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[6] This issue is not moot because, although defendant was ordered to serve six months in the county jail as a condition of his probation, the parties stipulated to defer his remand to custody until January 8, 2010 while he underwent chemotherapy. We do not know whether his remand has been further delayed.

The court is further directed to clarify the amount of the restitution fine it intended to impose pursuant to section 1202.4, subdivision (b), and to amend its order accordingly. If the court intended to impose a $200 fine, it shall amend the order to specify a $200 restitution fine, a $20 administrative fee, and a $200 probation revocation restitution fine. If, on the other hand, the court intended to impose a $220 restitution fine, the court shall amend the order to impose the mandatory $22 assessment on the $220 restitution fine.

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Mihara, J.

I CONCUR:

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Bamattre-Manoukian, Acting P. J.

McAdams, J., Concurring and Dissenting.

I concur in the judgment, as modified, in all respects but one.

I dissent on the issue of additional conduct credits under the 2009 amendments to Penal Code section 4019. I agree with the reasoning of the numerous cases that have held the amendments apply retroactively, including, most recently, *People v. Keating* (2010) 185 Cal.App.4th 364.[1] In my view, such a conclusion follows from California Supreme Court precedent. As the Court reiterated in *People v. Nasalga* (1996) 12 Cal.4th 784, "provisions of a statute that have an ameliorative effect must be given retroactive effect, even where other provisions of the same statute clearly do not have such an effect." (*Id.*, at p. 796, following *People v. Estrada* (1965) 63 Cal.2d 740.) I would therefore find the amendments to Penal Code section 4019 at issue here apply retroactively.

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McAdams, J.

[1] The California Supreme Court has recently granted review in several cases involving this issue, including those which have found the statute applies retroactively (*People v. Brown*, S181963; *People v. House*, S182813; *People v. Landon*, S182808) and one which has found it applies prospectively only. (*People v. Rodriguez*, S181808.) Several more petitions for review are pending.